Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

OJI PAPER CO., LTD.,

Petitioner,

v.

EXECU-TECH BUSINESS SYSTEMS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state court forego application of the minimum contacts test and exercise in personam jurisdiction over a nonresident defendant on the theory that an alleged co-conspirator's unilateral contacts with the forum are automatically attributable to the nonresident defendant?

2. May a nonresident defendant sued for price fixing be subjected to in personam jurisdiction simply because the residual effects of the alleged conspiracy were said to have been felt within the forum when products developed by an alleged co-conspirator were sold there? In other words, do allegations of conspiracy create in personam jurisdiction wherever the stream of residual effects flows, regardless of foreseeability and purposefulness?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Oji Paper Co. Ltd., has no parent corporation, and no publicly held company owns 10% or more of its stock.

LIST OF PARTIES

In addition to the petitioner, the following companies were defendants below and are being served as respondents herein:

Appleton Papers, Inc.
Elof Hansson Paper & Board, Inc.
Kanzaki Specialty Papers, Inc.
Nippon Paper Industries Co., Ltd.
Mitsubishi Corporation
Mitsubishi Paper Mills Ltd.
Mitsubishi International Corp.

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Petitioner Oji Paper Company, Ltd. ("Oji") respectfully prays that a writ of certiorari issue to review the decision of the Florida Supreme Court entered on January 20, 2000.

OPINIONS BELOW

The decision and order of the Florida Superior Court granting dismissal was issued on June 2, 1997. PA 17a.[1] The decision of the Florida Fourth District Court of Appeal was issued on January 21, 1998 and is reported at 708 So. 2d 599. PA 12a. The decision of the Florida Supreme Court reversing the trial court and exercising jurisdiction over petitioner was issued on January 20, 2000, and is reported at 752 So. 2d 582. PA 1a. The Florida Supreme Court denied Oji's motion for rehearing on March 2, 2000. PA 19a.

STATEMENT OF JURISDICTION

The decision of the Florida Supreme Court was entered on January 20, 2000. The court denied rehearing of the decision on March 2, 2000. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a). Because it " 'is plainly final on the federal issue and is not subject to further review in the state courts,' " *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) (*quoting Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975)), the decision of the Florida Supreme Court is final within the meaning of 28 U.S.C. § 1257.

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1. References to "PA__" are to the appendix filed with the petition.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution

SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

I. Introduction

The underlying controversy in this case involves an alleged conspiracy to fix the price at which jumbo rolls of thermal facsimile ("fax") paper are sold. The threshold and critical issue, however, is jurisdictional. Simply put, may the State of Florida exercise in personam jurisdiction over a foreign manufacturer of fax paper whose product was never marketed or sold in the state and whose only plausible connection with the state is an allegation that fax paper manufactured by an alleged co-conspirator may have been sold there?

The Florida Supreme Court upheld jurisdiction on precisely these facts, and in so doing, applied an extreme example of a theory of in personam jurisdiction that

reflexively attributes the unilateral contacts of alleged co-conspirators to the nonresident defendant. As applied by the Florida Supreme Court, neither purposefulness nor foreseeability plays any part in this analysis. Indeed, traditional minimum contacts analysis is simply abandoned.

State and federal courts are in conflict over the propriety and application of co-conspirator jurisdiction. Some courts require an application of minimum contacts analysis as part of the process of attribution, others automatically attribute the co-conspirator's contacts to the nonresident defendant. The Florida Supreme Court decision adopts the most extreme version of that latter approach. As is developed below, the facts and proceedings of this case present this Court with an ideal vehicle through which to resolve that conflict.

II. Facts and Proceedings

The Oji Paper Company, Ltd. ("Oji"), is a Japanese corporation with its principal place of business in Tokyo, Japan.[2] Among other things, Oji manufactures jumbo rolls of fax paper. It sells the jumbo rolls in Japan to Elof Hansson K.K. ("EHKK"), which takes title to the goods in Japan and assumes any future risk of loss. EHKK then conveys the jumbo rolls to its sister company, Elof Hansson Paper & Board, Inc. ("EHPB"), an independent trading house based in New York. Oji owns no interest in either EHKK or EHPB. EHPB sells the jumbo rolls to companies that "convert" or cut the jumbo rolls into smaller, finished rolls. Most of EHPB's converter customers are located in the United States. Those companies sell the finished units to

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2. In October 1996, after this action was filed, New Oji Paper Co. Ltd. changed its name to Oji as a result of a merger.

wholesalers and retailers. *See* Affidavit of Katsuhiko Tsusima (A[3] 46-49).

Although all sales of Oji jumbo rolls take place in Japan, some Oji-manufactured fax paper is eventually sold in the United States through the marketing chain initiated by Oji's sales to EHKK. During the time frame relevant to this case, sales of Oji-manufactured fax paper in the United States amounted to approximately $3,000,000, a 2.5% market share.

In 1995, the United States Department of Justice charged eight international companies in this industry, including Oji, with violations of the Sherman Antitrust Act. The government claimed that the defendants had conspired to fix the price at which jumbo rolls of fax paper were sold throughout North America between July 1991 and early 1992. Six of the alleged co-conspirators, including Oji, entered guilty pleas. The Informations against those defendants were lodged in the Federal District Court for the District of Massachusetts. Oji was fined $1.75 million for its part in the conspiracy. Two of the alleged co-conspirators, Appleton Papers, Inc. ("Appleton") and Nippon Paper Industries Company, Ltd. ("NPI"), went to trial. Appleton was found not guilty by a jury; NPI won a judgment of acquittal.

The plea agreement that Oji signed did not specify with whom Oji had conspired (A 87-99). Nor did anything in the Information or the plea agreement indicate or suggest any connection between the conspiracy or any of the conspirators and the State of Florida. There was, in short, no allegation of any effect or overt act taking place in Florida. *Id.*

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3. References to "A__" are to pages of the Appendix on Appeal filed by plaintiff-respondent below.

On July 10, 1996, Execu-Tech Business Systems, Inc. ("Execu-Tech") filed the immediate class action suit in a Florida state court seeking damages for a claimed violation of Florida's Deceptive Practices Act (A 1-13). Named as defendants in this civil action were the eight defendants in the federal antitrust proceedings. The essence of Execu-Tech's claim was that the conspiracy charged in the Massachusetts federal proceeding had the effect of inflating the price of fax paper sold in the State of Florida. The complaint did not specify where the conspiracy had occurred or provide any details of the conspiracy; nor did it allege any connection between the State of Florida and Oji or any other alleged co-conspirator. The complaint simply alleged in general terms the existence of some residual conspiratorial effect within the state. Most importantly, the complaint did not allege that any Oji-manufactured fax paper ever entered or was sold in the Florida market or that Oji was aware that any fax paper manufactured by one of its alleged co-conspirators would enter the Florida market.

On February 3, 1997, Oji moved to dismiss the complaint for lack of in personam jurisdiction (A 35-52). Oji argued that the assertion of jurisdiction violated both the Florida long-arm statute and the Fourteenth Amendment Due Process Clause. In support of its motion, Oji noted Execu-Tech's complete failure to allege any purposeful contacts by Oji with the State of Florida. Oji attached to its motion the affidavit of Katsuhiko Tsusima, the General Manager of Oji's Communications Paper Sales Department. Mr. Tsusima's affidavit affirmed in specific detail the lack of any connection between Oji and the State of Florida, including the absence of any sales, shipments, or solicitations by Oji or its agents in that state (A 46-49).

In responding to Oji's Motion to Dismiss, Execu-Tech forewent discovery and opted to rely exclusively on documentary evidence it had gathered. That documentary evidence, which was presented at the hearing on the motion, was as follows: (1) a series of invoices indicating that one of Oji's co-defendants, Appleton, which had been found not guilty in the federal proceeding, sold jumbo rolls of fax paper to a company in Ohio, Paper Systems, Inc. ("Paper Systems"), under instructions from Paper Systems that the jumbo rolls be delivered to Paper Systems' Ocala, Florida manufacturing plant (A 133-137); (2) documents indicating that Paper Systems made one purchase of jumbo rolls from EHPB to be delivered to Paper Systems in Ohio (A 128-132); and (3) a document that very loosely and ambiguously suggests that an Oji representative may have attended a convention in Florida on an unspecified date for an unspecified reason (A 125-126). No evidence was submitted suggesting any sales of Oji-manufactured fax paper in Florida. Nor was any evidence introduced showing any connection whatsoever between Oji and Appleton.

After a hearing on Oji's Motion to Dismiss, the trial court dismissed the complaint without prejudice, concluding, in essence, that Execu-Tech had failed to show any purposeful connection between Oji and the State of Florida (A 138-155; 156). Instead of seeking further evidence to establish minimum contacts between Oji and the State of Florida, Execu-Tech appealed.

The Fourth District Court of Appeal affirmed. *Execu-Tech Business Systems, Inc. v. New Oji Paper Co., Ltd.*, 708 So. 2d 599 (Fla. 4th DCA 1998). The court specifically refused to attribute Appleton's contacts to Oji without first ascertaining if Oji was somehow implicated in those contacts.

According to the appellate court, co-conspirator jurisdiction can be sustained under the Due Process Clause only if the conspiracy resulted in a substantial act or effect in the state and only if the nonresident conspirator "knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy." *Id.* at 600 (*quoting Instituto Bancario Italiano v. Hunter Engineering Co.*, 449 A.2d 210, 225 (Del. 1982)). On the facts, the Execu-Tech allegations failed to meet any of these criteria.

The Florida Supreme Court reversed, concluding that in personam jurisdiction could be asserted over Oji despite the lack of any evidence that Oji had engaged in purposeful contacts with the forum state or that Oji had undertaken any action with foreseeable consequences in the state. *Execu-Tech Business Systems, Inc. v. New Oji Paper Company Ltd.*, 752 So. 2d 582 (Fla. 2000). It was sufficient that Oji had pled guilty to a conspiracy that was later alleged to have had a residual effect in Florida. Moreover, there was no need to assess the substantiality or the foreseeability of that effect. Instead, the court held that in personam jurisdiction over out-of-state co-conspirators automatically attaches whenever a plaintiff alleges that the actions of any one conspirator has had consequences within the state. In the view of the Florida Supreme Court, therefore, the combination of Oji's guilty plea and Execu-Tech's allegation of a residual effect within the state sufficed to sustain jurisdiction.

REASONS FOR GRANTING THE WRIT

First. The writ should be granted to resolve a substantial doctrinal conflict over the scope and application of "co-conspirator jurisdiction." Co-conspirator jurisdiction is a theory of personal jurisdiction that has developed somewhat haphazardly over the past thirty years. This development has occurred without any guidance from this Court. It began as an offhanded observation by a single court, but has grown exponentially and chaotically since that time. The question is this, to what extent may a member of an alleged conspiracy be subjected to personal jurisdiction based on the unilateral contacts of a co-conspirator?

There have been almost 200 reported decisions involving this issue since it first arose in the 1970s, over 70 of them within the last five years. The lower courts' answers range from an almost automatic attribution of those contacts to a decisive rejection of the co-conspirator theory. Between these endpoints courts have adopted a variety of approaches, some of which are wholly incompatible with one another. From a litigant's perspective, and particularly an international business perspective, the current confused state of the law is intolerable.

In general, it is impossible to reconcile the more extreme versions of co-conspirator jurisdiction with this Court's decree that "[t]he requirements of *International Shoe* [mandating minimum contacts] must be met as to *each* defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (attribution of an insurer's contacts to its insured was "plainly unconstitutional") (emphasis added). Some courts have recognized this point, either disallowing the theory altogether

or at least attempting to build in some due process safeguards. Others, like the Florida Supreme Court here, blindly attribute the co-conspirator's contacts to the non-resident defendant without regard to this Court's due process standards of purposefulness and foreseeability. Clearly, some guidance to the lower courts is required.

Second. The second reason for granting the writ is to clarify the correct standard for the lower courts to apply in evaluating jurisdiction over foreign corporations under a stream of commerce theory. As one court noted, "the splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue." *Continental Research Corp. v. Reeves*, 419 S.E.2d 48, 53 (Ga. Ct. App. 1992). Some courts have disregarded *Asahi* altogether due to the perceived lack of a consensus on the stream of commerce issue. Others have chosen one approach (or more) from among the three alternate views expressed by Justices O'Connor, Brennan, and Stevens in their *Asahi* opinions. The immediate case gives this Court an opportunity to resolve this confusion and to provide much needed guidance on this vital and recurring issue.

I. THERE IS A SUBSTANTIAL CONFLICT AMONG STATE AND FEDERAL COURTS OVER THE PROPRIETY AND SCOPE OF CO-CONSPIRATOR JURISDICTION.

The co-conspirator theory obviously raises serious questions of due process when it is applied without any reference to actions undertaken by the non-resident defendant. "[T]he requirement of personal jurisdiction represents first of all an *individual* right . . . ." *Insurance Corp. of Ireland, Ltd. v. Companie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982). Due process requires a

connection between each defendant and the forum, not between the defendants in the aggregate and the forum.[4] In an analogous setting, this Court labeled as "frivolous albeit ingenious" an attempt to use a conspiracy theory to establish venue in federal antitrust cases. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953).[5]

The absence of guidance from this Court[6] as to whether the co-conspirator theory comports with due process has left federal and state courts struggling to define the contours of the theory, with inconsistent results. As one commentator stated over 15 years ago, "case law provides neither a coherent framework for the theory's application nor adequate protection against its abuse."[7] The situation has only deteriorated since then.

Some of these decisions on the co-conspiracy theory hold that the exercise of personal jurisdiction over a non-resident defendant who committed no tortious act within the forum

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4. *See Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980) (aggregating contacts is "plainly unconstitutional").

5. *See Kipperman v. McCone*, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976) (rejecting conspiracy theory of jurisdiction, citing *Bankers Life*).

6. *See Leu Trust & Banking (Bahamas) Ltd. v. Hercules, Inc.*, 507 U.S. 1025 (1993) (Petition for certiorari, raising similar issues, dismissed under this Court's Rule 46.1).

7. Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Ford. L. Rev. 234, 236 (1983).

state would violate due process.[8] These cases seem most in tune with this Court's minimum contacts jurisprudence. They maintain that personal jurisdiction must be premised on *the defendant's* conduct within the forum state, not that of a co-conspirator.[9] For example, in *Hawkins v. Upjohn Co.*, 890 F. Supp. 601 (E.D. Tex. 1994), the court refused to exercise jurisdiction over non-resident defendants based on their alleged conspiratorial relationship with a resident defendant, because those defendants had no contact of their own with the forum. The court held that a contrary outcome would undermine the Supreme Court's Due Process rationale that there be some predictability as to where a party may be subject to suit. *Id.* at 609 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)).

Similarly, other courts have questioned the viability of the theory,[10] some noting that due process implications have

8. *See, e.g., Karsten Mfg. Corp. v. United States Gold Assoc.*, 728 F. Supp. 1429 (D. Ariz. 1990); *Bamford v. Hobbs*, 569 F. Supp. 160 (S.D. Tex. 1983); *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co. (America) Inc.*, 499 F. Supp. 829 (D. Or. 1980); *Weinstein v. Norman M. Morris Corp.*, 432 F. Supp. 337 (E.D. Mich. 1977); *I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp.*, 408 F. Supp. 1023 (D. Minn. 1976); *Coopers & Lybrand v. Cocklereece*, 276 S.E.2d 845 (Ga. Ct. App. 1981); *Stangel v. Rucker*, 398 N.W.2d 602 (Minn. Ct. App. 1986); *Allen v. Columbia Fin. Management, Ltd.*, 377 S.E.2d 352 (S.C. Ct. App. 1988); *Nat'l Industrial Sand Assoc. v. Gibson*, 897 S.W.2d 769 (Tex. 1995); *Schroeder v. Valdez*, 941 S.W.2d 312 (Tex. Ct. App. 1997); *Hewitt v. Hewitt*, 896 P.2d 1312 (Wash. Ct. App. 1995).

9. *See, e.g., Hollar v. Philip Morris Inc.*, 43 F. Supp. 2d 794, 802 n.7 (N.D. Ohio 1998); *Tiffany Records, Inc. v. M.B. Krupp Distributors, Inc.*, 81 Cal. Rptr. 320 (Cal. Ct. App. 1969).

10. *See, e.g., Conwed Corp. v. R.J. Reynolds Tobacco Co.*, 1999 U.S. Dist. LEXIS 9641 (D. Minn. 1999) (unreported); *Markarian v. Garoogian*, 767 F. Supp. 173 (N.D. Ill. 1991).

not always been considered when the theory has been applied.[11] In *National Industrial Sand Assoc. v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995), for example, the Supreme Court of Texas refused to recognize jurisdiction over a non-resident defendant "based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state." The court left open the possibility of finding jurisdiction based on stronger facts showing purposeful availment by the foreign defendant. Still other courts have simply rejected the theory outright, presumably because of its incompatibility with due process.[12] On the other, and more troubling, end of the spectrum are cases that ignore due process principles, automatically attributing to the non-resident defendant the acts of one or more alleged co-conspirators.[13]

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11. *See Edmond v. United States Postal Serv. Gen. Counsel*, 949 F.2d 415, 428 n.2 (CADC 1991) (Silberman, J., concurring in part and dissenting in part), *reh'g denied*, 953 F.2d 1398 (CADC 1992) (en banc); *Schwartz v. Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999) (Supreme Court decisions "strongly suggest" conspiracy participation is not enough to meet due process).

12. *See, e.g., City & County of San Francisco v. Phillip Morris*, 1998 U.S. Dist. LEXIS 3056 (N.D. Cal. 1998) (unreported); *Kipperman v. McCone*, 422 F. Supp. 860, 873 (N.D. Cal. 1976); *Mansour v. Superior Court*, 38 Cal. App. 4th 1750, 1760 (1995); *Schroeder v. Valdez*, 941 S.W.2d 312 (Tex. Ct. App. 1997).

13. *See, e.g., Baldridge v. McPike, Inc.*, 466 F.2d 65 (CA10 1972); *Cherokee Labs., Inc. v. Rotary Drilling Servs., Inc.*, 383 F.2d 97 (CA5 1967); *In re ND Personal Injury Asbestos Litig. No. 1*, 737 F. Supp. 1087 (D.N.D. 1990); *Hanes Cos. v. Ronson*, 712 F. Supp. 1223 (M.D.N.C. 1988); *Professional Investors Life Ins. Co. v. Roussel*, 445 F. Supp. 687 (D. Kan. 1978); *National Van Lines, Inc. v. Atlas*

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Other courts make up the continuum between. Some require, in addition to the allegation of conspiracy, that an overt act in furtherance of the conspiracy must have been committed within the state by one of the conspirators.[14] In *Wiggins v. Equifax Inc.*, 853 F. Supp. 500 (D.D.C. 1994), the court held that under the conspiracy theory of jurisdiction, a co-conspirator's acts within the forum subjected a non-resident co-conspirator to personal jurisdiction. "Thus in order to succeed in the conspiracy theory, plaintiff must

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Van Lines, Inc., 406 F. Supp. 1087 (N.D. Ill. 1975); *Mandelkorn v. Patrick*, 359 F. Supp. 692 (D.D.C. 1973); *Maricopa County v. Am. Petrofina, Inc.*, 322 F. Supp. 467 (N.D. Cal. 1971); *Hunt v. Nevada State Bank*, 172 N.W.2d 292 (Minn. 1969); *Cameron v. Owens-Corning Fiberglas Corp.*, 695 N.E.2d 572 (Ill. App. Ct. 1998).

14. *See, e.g., Jungquist v. Sheikh Sultan bin Khalifa al Nahyan*, 115 F.3d 1020 (CADC 1997); *Edmond v. United States Postal Service General Counsel*, 949 F.2d 415 (CADC 1991); *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387 (CA7 1983); *Simon v. Philip Morris, Inc.*, 2000 U.S. Dist. LEXIS 265 (E.D.N.Y. 2000) (unreported); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 43 F. Supp. 2d 904 (N.D. Ill. 1999); *Zivitz v. Greenburg*, 1999 U.S. Dist. LEXIS 16646 (N.D. Ill. 1999) (unreported); *Real Colors, Inc. v. Patel*, 974 F. Supp. 645 (N.D. Ill. 1997); *General Motors Corp. v. Lopez de Arriortua*, 948 F. Supp. 656 (E.D. Mich. 1996); *Pendelton v. Germino*, 1995 U.S. Dist. LEXIS 11739 (N.D. Ill. 1995) (unreported); *Hade v. Kott*, 1993 U.S. Dist. LEXIS 2714 (S.D.N.Y. 1993) (unreported); *Management Info. Techs., Inc. v. Alyeska Pipeline Serv. Co.*, 1993 U.S. Dist. LEXIS 7642 (D.D.C. 1993) (unreported); *Dooley v. United Techs. Corp.*, 786 F. Supp. 65 (D.D.C. 1992); *First Chicago Int'l v. United Exch. Co.*, 655 F. Supp. 787 (D.D.C. 1987), *aff'd in part, rev'd in part*, 836 F.2d 1375 (CADC 1988); *In re Arthur Treacher's Franchisee Litig.*, 92 F.R.D. 398 (E.D. Pa. 1981); *National Egg Co. v. Bank Leumi le-Israel*, 514 F. Supp. 1125 (N.D. Ga. 1981); *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838 (S.D. Fla. 1975).

allege: (1) the existence of a conspiracy of which the defendants were members; and (2) overt acts committed in the District of Columbia in furtherance of the conspiracy." *Id.* at 504.

Some courts go one step further to require not merely the commission of an overt act within the forum, but the commission of a substantial act within the state *combined with* the nonresident co-conspirator's actual or constructive knowledge of the conduct or its effect in the forum state.[15] These courts reason that this test is "designed to withstand due process challenge" because of the knowledge component.[16] In *Instituto Bancario Italiano SpA v. Hunter Engineering Co.*, 449 A.2d 210, 227 (Del. 1982), the

15. *See, e.g.*, *Santana Products, Inc. v. Bobrick Washroom Equipment*, 14 F. Supp. 2d 710 (M.D. Pa. 1998); *Insultherm, Inc. v. Tank Insulation International, Inc.*, 909 F. Supp. 465 (N.D. Tex. 1995), *aff'd*, 95 F.3d 1166 (Fed. Cir. 1996); *Qantel Corp. v. Niemuller*, 771 F. Supp. 1361 (S.D.N.Y. 1991); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125 (D. Mass. 1982); *Vermont Castings, Inc. v. Evans Products Co.*, 510 F. Supp. 940 (D. Vt. 1981); *Gemini Enterprises, Inc. v. WFMY Television Corp.*, 470 F. Supp. 559 (M.D.N.C. 1979); *Turner v. Baxley*, 354 F. Supp. 963 (D. Vt. 1972); *Macklowe v. Planet Hollywood, Inc.*, 1994 Del. Ch. LEXIS 179 (Del. Ch. 1994) (unreported); *Newspan, Inc. v. Hearthstone Funding Corp.*, 1994 Del. Ch. LEXIS 52 (Del. Ch. 1994) (unreported); *Hart Holding Co. v. Drexel Burnham Lambert Inc.*, 1992 Del. Ch. LEXIS 112 (Del. Ch. 1992) (unreported); *Mifal Klita v. Cyclo3pss Corp.*, 1998 Del. Super. LEXIS 382 (Del. Super. Ct. 1998) (unreported); *Chenault v. Walker*, 2000 Tenn. App. LEXIS 83 (Tenn. Ct. App. 2000) (unreported); *Manufacturers Consolidation Serv., Inc. v. Rodell*, 2000 Tenn. App. LEXIS 148 (Tenn. Ct. App. 2000) (unreported).

16. *HMG/Courtland Properties, Inc. v. Gray*, 729 A.2d 300, 307 (Del. Chan. 1999).

Supreme Court of Delaware held that the non-resident defendants' participation in a conspiracy to dilute the plaintiff's security interest in a corporation, coupled with their knowledge of the performance of an act in furtherance of the conspiracy within the jurisdiction, was sufficient to confer the court with personal jurisdiction over the absent defendants.

Perhaps the most rigorous test that permits attribution of a co-conspirator's acts demands that: (1) the moving defendant had an awareness of the effects in the forum of its actions; (2) the actions of the co-conspirators in the state were for the benefit of the foreign conspirators; and (3) those acting within the state did so at the direction or under the control of the out-of-state defendant.[17]

A number of other cases have recognized the existence of the conspiracy theory but have not relied on it for their decision, either because the validity of the theory is in doubt, because the plaintiff had not adequately pled the existence of a conspiracy,[18] and/or

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17. *See, e.g., Cleft of the Rock Found. v. Wilson*, 992 F. Supp. 574, 583 (E.D.N.Y. 1998) (citing *Chrysler Capital Corp. v. Century Power Corp.*, 778 F. Supp. 1260, 1269 (S.D.N.Y. 1991)); *Hawkins v. Upjohn Co.*, 890 F. Supp. 601, 607 (E.D. Tex. 1994).

18. *Posner v. Essex Insurance Co.*, 178 F.3d 1209 (CA11 1999); *Stauffacher v. Bennett*, 969 F.2d 455 (CA7 1992); *Ecclesiastical Order of the Ism of Am, Inc.*, 845 F.2d 113 (CA6 1988); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (CA6 1981); *McLaughlin v. McPhail*, 707 F.2d 800 (CA4 1983); *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449 (CA10 1983); *Glaros v. Perse*, 628 F.2d 679 (CA1 1980); (Cont'd)

because there was an alternate basis for jurisdiction.[19]

Finally, commentators have criticized the conspiracy theory of jurisdiction because it tends to obfuscate the due process inquiry.[20] They note that a conspirator may be liable under substantive law for acts that do not confer jurisdiction over him. They also point out that while jurisdictional acts of an agent may be imputed to a corporation, it is proper to do so only when the corporation directs and controls the agent, a factor missing from most of the decisions that rely on a conspiracy theory.

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Ali v. United States Dep't of Health & Human Servs., 1996 U.S. Dist. LEXIS 18703 (N.D. Cal. 1996), *aff'd in part, rev'd in part*, 1998 U.S. App. LEXIS 15346 (CA9 1998) (unreported); *Dymits v. Am. Brands, Inc. v. Chasin*, 1996 U.S. Dist. LEXIS 19742 (N.D. Cal. 1996) (unreported); *Sameena, Inc. v. United States Dep't of the Air Force*, 1996 U.S. Dist. LEXIS 18680 (N.D. Cal. 1996), *aff'd in part, rev'd in part*, 147 F.3d 1148 (CA9 1998) (unreported); *In re Stucco Litig.*, 1997 U.S. Dist. LEXIS 11236 (E.D. Cal. 1996) (unreported); *Boon Partners v. Advanced Financial Concepts, Inc.*, 917 F. Supp. 392 (E.D.N.C. 1996); *Salvador v. Meese*, 641 F. Supp. 1409 (D. Mass. 1986); *National Egg Co. v. Bank Leumi le-Israel B.M.*, 504 F. Supp. 305 (N.D. Ga. 1980); *Williams v. Garcia*, 569 F. Supp. 1452 (E.D. Mich. 1983); *McLaughlin v. Copeland*, 435 F. Supp. 513 (D. Md. 1977); *Computer People, Inc. v. Best Int'l Group, Inc.*, 1999 Del. Ch. LEXIS 96 (Del. Ch. 1999) (unreported); *Poole & Kent Co. v. Equilease Assocs. I*, 523 A.2d 1018 (Ct. App. Md. 1987).

19. *See, e.g., United Phosphorus, Ltd. v. Angus Chemical Co.*, 1996 U.S. Dist. LEXIS 203 (N.D. Ill. 1996) (unreported); *Finance Co. of Am. v. Bankamerica Corp.*, 493 F. Supp. 895 (D. Md. 1980); *Ammon v. Kaplow*, 468 F. Supp. 1304 (D. Kan. 1979); *Professional Investors Life Ins. Co. v. Roussel*, 445 F. Supp. 687 (D. Kan. 1978).

20. *See* Althouse, *supra* note 7, 52 Ford. L. Rev. at 251-54; Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of Personal Jurisdiction*, 84 Colum. L. Rev. 506, 521-31 (1984) (also documenting judicial disapproval of the precursor conspiracy theory of venue).

In the present case, the Florida Supreme Court applied the most extreme version of co-conspirator theory when it held that the contacts by one of Oji's alleged co-conspirators were automatically attributable to Oji without any need to establish that Oji had engaged in foreseeable or purposeful conduct directed toward the forum state.

This issue is not going away. If anything, plaintiffs rely on a form of the co-conspirator theory more and more frequently. In the antitrust field in particular, the dramatic rise in international businesses under investigation by the Department of Justice has ensured that application of the co-conspirator theory will continue in the civil suits that inevitably follow government action.[21] The simple and critical point, however, is that the lower courts, both state and federal, are applying the law in a state of confusion. The lack of any coherent doctrine is both wasteful and unfair. This Court could easily remedy that situation by granting the writ in this case.

II. THERE IS A PRESSING NEED TO CLARIFY THE STANDARD FOR STREAM OF COMMERCE JURISDICTION

Another theory of jurisdiction at issue in this case is the stream of commerce theory. The proper due process standard to be applied to non-resident defendants under that theory remains in dispute some 13 years after this Court last visited

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21. *See International Cartels*, Address by Deputy Assistant Attorney General Gary R. Spratling (Dec. 9, 1999) (over last two years, roughly 50% of corporate defendants in criminal cases were foreign-based), and *The War Against International Cartels: Lessons from the Battlefront*, Address by Assistant Attorney General Joel Klein (Oct. 14, 1999), both available at <www.usdoj.gov/atr>.

the issue in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

In *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), the Court held that

> due process requires only that in order to subject a defendant to judgment in personam, if he be not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

(*Quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), the Court explained that this requires that the defendant have purposefully availed itself of the privilege of conducting activities within the state, thereby invoking the benefits and protections of the state's laws.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court refined the analysis in the context of a foreign manufacturer selling goods that caused injury in this country. The Court held that purposeful availment meant that, by its actions to serve the market for its products in other states, the defendant could reasonably anticipate being haled into court in the forum. *Id.* at 297. That test could be met, the Court explained, when a manufacturer places a product in "the stream of commerce" with awareness that it would ultimately be sold in the forum state, even through the conduct of intermediaries, if that was foreseeable. Three years later the Court decided *Asahi*. The full Court agreed that it would be unreasonable to assert jurisdiction over the

foreign defendant, but the Court offered three different approaches to evaluating purposeful availment.

Justice O'Connor's opinion in *Asahi*, joined in by three other justices, held that in order to be subject to a forum state's jurisdiction, the non-resident defendant must have done more than simply place goods in the stream of commerce. The defendant must have engaged in conduct purposefully directed at the forum such that it exhibited "an intent or purpose to serve the market in the forum State." *Id.* at 112. Mere awareness that a product might find its way into the forum state would not be sufficient. Justice O'Connor's theory is often referred to as "stream of commerce plus."

Justice Brennan, in an opinion joined in by three other Justices, rejected Justice O'Connor's requirement that there be additional conduct by the defendant to warrant jurisdiction. He found that Asahi had established minimum contacts with the forum state because it was aware that its product would eventually be marketed in the state and that Asahi would benefit economically thereby. *See id.* at 121. In Justice Brennan's opinion, the stream of commerce refers to a "regular and anticipated flow of products" into the market. *Id.* at 117.

Justice Stevens, joined by two Justices, agreed that exercising personal jurisdiction over Asahi would be unfair, so opined that there was no need to examine the minimum contacts issue. *See id.* at 121. He did observe that it would be difficult to create a fine line between awareness that a product would find its way into the forum state and purposeful availment, which would require examination of various factors other than awareness, such as the volume, value, and hazardous character of the good. *See id.* at 122.

The lower federal and state courts do not know which of these opinions to follow. As one court remarked, "the splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue." *Continental Research Corp. v. Reeves*, 419 S.E.2d 48, 53 (Ga. Ct. App. 1992) (citation omitted).[22] "Though generally agreeing that the Supreme Court has further 'muddied the [stream of commerce] waters,' the lower courts have reached different conclusions regarding their obligations in a steam of commerce situation after *Asahi*."[23]

Some courts have chosen to disregard *Asahi* completely because of the failure of the majority to come to a consensus.[24] Instead, these courts apply the *World-Wide*

22. *See also Renner v. Lanard Toys Ltd.*, 33 F.3d 277 (CA3 1994); *In re Baan Co. Sec. Litig.*, 2000 WL 38775 (D.D.C. 2000) (unreported); *Andersen v. Sportmart, Inc.*, 57 F. Supp. 2d 651 (N.D. Ind. 1999); *Alvarez v. Aircraft Modular Products, Inc.*, 949 F. Supp. 1470 (D. Haw. 1996); *Hershey Pasta Group v. Vitelli-Elvea Co.*, 921 F. Supp. 1344 (M.D. Pa. 1996); *Curtis Management Group, Inc. v. Academy of Motion Picture Arts & Sciences*, 717 F. Supp. 1362 (S.D. Ind. 1989); *Ruckstuhl v. Owens-Corning Fiberglas Corp.*, 731 So. 2d 881 (La. 1999); *American Valve Mfg. Co. v. Valvo Industria Ing Rizzio*, 685 So. 2d 1156 (La. Ct. App. 1996); *Parry v. Ernst Home Center Corp.*, 779 P.2d 659 (Utah 1989).

23. Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 Ky. L.J. 243, 275 (1988-1989); *see* R. Casad, "Jurisdiction" in 16 Moore's Federal Practice ¶ 108.42[4][b] (3d ed. 1999) (the three opinions "confuse, rather than elucidate, the purposeful availment requirement").

24. *See, e.g., Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (CA8 1994); *Ham v. La Cienega Music Co.*, (Cont'd)

Volkswagen standard, *i.e.*, knowledge that the defendant's product will enter the forum state by the stream of commerce. In *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (CA5 1993), the court reversed the district court's implementation of Justice O'Connor's standard, stating that "this circuit expressed its position that *Asahi* does not provide clear guidance on the 'minimum contacts prong' and, therefore we will continue to follow the stream of commerce analysis in *World-Wide Volkswagen*."[25] This was essentially Justice Brennan's position in *Asahi*.

A number of courts have elected to follow Justice O'Connor's "stream of commerce plus" approach.[26] Still other courts have followed Justice Steven's lead, avoiding

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4 F.3d 413 (CA5 1993); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (CA7 1992) (Supreme Court established stream of commerce theory and had not rejected it, even though *Asahi* cast doubt on it); *Simmons v. Caterpillar, Inc.*, 874 F. Supp. 762 (E.D. Tex. 1995).

25. *See also Renner v. Lanard Toys Ltd.*, 33 F.3d 277 (CA3 1994); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (CA5 1989); *De Moss v. City Market, Inc.*, 762 F. Supp. 913 (D. Utah 1991).

26. *See, e.g., Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81 (CA1 1997); *Terracom v. Vally Nat'l Bank*, 49 F.3d 555 (CA9 1995); *Sawtelle v. Farrell*, 70 F.3d 1381 (CA1 1995); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (CA4 1994); *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (CA6 1993); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 706 F.2d 369 (CA8 1990); *Brown v. Geha-Werke GmbH*, 69 F. Supp. 2d 770 (D.S.C. 1999); *Highway Auto Sales, Inc. v. Auto-Konig of Scottsdale, Inc.*, 943 F. Supp. 825 (N.D. Ohio 1996); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996); *Tomashevsky v. Komori Printing Machinery Co.*, 691 F. Supp. 336 (S.D. Fla. 1988).

the complex minimum contacts analysis by deciding the case based on a lack of fairness.[27]

In the instant case, the Florida Supreme Court concluded that Oji should have anticipated being haled into a Florida court because it allegedly "embarked upon a criminal scheme to bilk consumers throughout the United States" and Florida is part of the United States. PA 9a. There is a strong element of the stream of commerce analysis in the court's opinion, because it relies on the plaintiff's allegation that "thermal fax paper produced and distributed by the conspirators was sold at a correspondingly inflated retail price in every state, including Florida, during the class period." PA 9a. But causing an effect in Florida is clearly not enough. There was no showing either that Oji: (1) had engaged in conduct purposely directed at Florida, such as efforts to market its products in Florida through advertising or local sales calls; or (2) knew its product would be sold in Florida, let alone that there would be a "regular and anticipated flow of [its] products" into the state. In short, the Florida Supreme Court seems to have adopted a stream of commerce theory that fails to meet even Justice Brennan's liberal approach to the doctrine.

This Court should grant the writ to clarify the jurisdictional standard courts should apply under the stream of commerce theory, an everyday issue for many commercial practitioners.

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27. *See, e.g., D'Almeida v. Stork Brabant B.V.*, 71 F.3d 50 (CA1 1995); *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26 (CA1 1988); *Orangeburg Pecan Co. v. Farmers Investment Co.*, 869 F. Supp. 351 (D.S.C. 1994); *Pawluczyk v. Global Upholstery Co.*, 854 F. Supp. 364 (E.D. Pa. 1994).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court issue a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF FLORIDA DATED JANUARY 20, 2000

SUPREME COURT OF FLORIDA

No. SC92881

EXECU-TECH BUSINESS SYSTEMS, INC.,

Petitioner,

vs.

NEW OJI PAPER COMPANY LTD., etc.,

Respondent.

[January 20, 2000]

SHAW, J.

We have for review *Execu-Tech Business Systems, Inc. v. New Oji Paper Co., Ltd.*, 708 So. 2d 599 (Fla. 4th DCA 1998), wherein the district court certified conflict with *Wilcox v. Stout*, 637 So. 2d 335 (Fla. 2d DCA 1994). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We quash *Execu-Tech*.

Thermal facsimile ("fax") paper, which is used in fax machines and recorders, is a special type of chemically-coated paper that creates an image when stimulated by a heated printer head. Thermal fax paper is manufactured in bulk rolls ("jumbo rolls") that are approximately forty to fifty inches wide and weigh up to 2000 pounds.

Appendix A

Manufacturers sell jumbo rolls to "trading houses," which in turn sell the product to "converters" who cut and repackage the rolls into smaller, eight and one-half inch wide rolls suitable for retail sale. Converters then sell the rolls to wholesalers and retailers. The finished product is purchased mainly by small businesses and private consumers.

A federal investigation into wholesale price-fixing practices in this $120 million per year industry led to charges being filed against eight of the leading manufacturers and trading houses of thermal fax paper used in the United States.[1] Most of the defendants — including New Oji Paper

1. Charges were filed against the following businesses: (1) Appleton Papers, Inc., a Wisconsin-based manufacturer of thermal fax paper; (2) Elof Hansson Paper & Board, Inc., a New York-based trading house for New Oji Paper Company of Japan; (3) Kanzaki Specialty Papers, Inc., a Massachusetts-based manufacturer of thermal fax paper; (4) Mitisubishi Corporation, a Japan-based trading house for Mitisubishi Paper Mills Company, Ltd.; (5) Mitsubishi International Corporation, a New York-based trading house for Mitisubishi Paper Mills Company, Ltd.; (6) Mitisubishi Paper Mills Company, Ltd., a Japan-based manufacturer of thermal fax paper; (7) New Oji Paper Company, Ltd., a Japan-based manufacturer of thermal fax paper; and (8) Nippon Paper Industries Company, Ltd., a Japan-based manufacturer of thermal fax paper. Execu-Tech alleged in the present complaint that the above corporations sold the following quantities of thermal fax paper in the United States: Appleton, $45 million in 1991; Elof Hansson, $3 million from November 1991 until March 1992; Kanzaki, $40 million in 1991; Mitisubishi Corporation, $5 million in 1991; Mitsubishi International, $5 million in 1991; Mitisubishi Paper Mills, (no amount listed); New Oji (no amount listed); Nippon, $6.1 million from February 1990 until March 1992.

Company, Ltd. — pled guilty and were fined.[2] Later, a Florida user of thermal fax paper, Execu-Tech Business Systems, Inc., filed the present class action on behalf of all Florida users of thermal fax paper. The complaint alleged that during the period from February 1990 through March 1992 (i.e., the "class period") the above defendants conspired to fix the wholesale price of jumbo rolls sold throughout the nation and that this paper ultimately was sold to Florida consumers at a correspondingly inflated retail price. The complaint sought unspecified damages.

Several of the defendants responded to the complaint on the merits, but New Oji, which is a Japan-based corporation, filed a response claiming that the Florida court lacked personal jurisdiction to proceed against New Oji. The trial court agreed and dismissed the complaint against New Oji. The district court affirmed and certified conflict with *Wilcox v. Stout*, 637 So. 2d 335 (Fla. 2d DCA 1994), wherein the district court held that a trial court may properly exercise personal jurisdiction over a foreign corporation based on a conspiracy theory of liability under Florida's long-arm statute.

New Oji asserts that the following circumstances obtain: New Oji is a Japanese corporation; New Oji sells jumbo rolls

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2. The charges were disposed of as follows (according to Execu-Tech's present complaint): New Oji, Kanzaki, Elof Hansson, and the Mitisubishi companies all pled guilty; Oji was fined $1.75 million; Kanzaki was fined $4.725 million; Elof Hannson was fined $200,000; and the Mitisubishi companies were fined a total of $1.26 million. The charges against Appleton and Nippon were still pending at the time the present complaint was filed.

of thermal fax paper in only Japan, not the United States; New Oji maintains no office in Florida; and Execu-Tech has not shown that any New Oji paper was sold in Florida during the class period. New Oji claims that the trial court properly dismissed the complaint for lack of personal jurisdiction. We disagree.

A trial court's ruling on a motion to dismiss based on a question of law is subject to de novo review.[3] The law governing personal jurisdiction over a foreign corporation is clear. This Court in *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989), set forth a two-step process for determining whether personal jurisdiction exists:

> In determining whether long-arm jurisdiction is appropriate in a given case, two inquiries must be made. First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute; and if it does, the next inquiry is whether sufficient "minimum contacts" are demonstrated to satisfy due process requirements.

Venetian Salami, 554 So. 2d at 502 (quoting *Unger v. Publisher Entry Service, Inc.*, 513 So. 2d 674, 675 (Fla. 5th DCA 1987)).

The first prong — i.e., the statutory prong — of the *Venetian Salami* standard is governed by Florida's long-arm statute and bestows broad jurisdiction on Florida courts. A

3. *See, e.g., Rittman v. Allstate Ins. Co.*, 727 So. 2d 391 (Fla. 1st DCA 1999).

court can exercise personal jurisdiction, *inter alia*, whenever a foreign corporation commits a "tortious act" on Florida soil.[4] The second prong — i.e., the constitutional prong —

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4. Florida's long-arm stature provides in relevant part as follows:

> 48.193 Acts subjecting person to jurisdiction of courts of state. —
>
> (1) *Any person, whether or not a citizen or resident or this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts*:
>
> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
>
> (b) *Committing a tortious act within this state.*
>
> (c) Owning, using, or possessing any real property within this state.
>
> . . . .
>
> (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
>
> 1. The defendant was engaged in solicitation or service activities within this state; or

(Cont'd)

is controlled by United States Supreme Court precedent interpreting the Due Process Clause and imposes a more restrictive requirement. A court can exercise personal jurisdiction only if the foreign corporation maintains "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[5]

Execu-Tech's present complaint comports with both prongs of the *Venetian Salami* standard. First, the complaint satisfies the statutory prong, for the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of Florida's long-arm statute. As noted above, Execu-Tech alleged that New Oji and other major manufacturers and trading houses of thermal fax paper deliberately conspired to fix the wholesale price of their product throughout the United States, including Florida. This conduct constitutes a violation of the Florida Deceptive and Unfair Trade Practices Act (the "Act"), which prohibits "unfair or

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(Cont'd)

> 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.
>
> (g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

§ 48.193(1), Fla. Stat. (1991) (emphasis added).

5. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

deceptive acts or practices in the conduct of any trade or commerce."[6] The Act authorizes a private cause of action for damages.[7] Thus, according to Execu-Tech's complaint,

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6. Section 501.204, Florida Statutes (1991), provides in relevant part as follows:

> 501.204 Unlawful acts and practices. —
>
> (1) *Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.*
>
> (2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretation of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

§ 501.204, Fla. Stat. (1991) (emphasis added).

7. Section 501.211, Florida Statutes (1991), provides in relevant part as follows:

> 501.211 Other individual remedies. —
>
> . . . .
>
> (2) *In any individual action brought by a consumer who has suffered a loss as a result of a violation of this part, such individual may recover actual damages*, plus attorney's fees and court costs as provided in s. 501.2105
>
> . . . .

§ 501.211, Fla. Stat. (1991) (emphasis added).

New Oji and the other conspirators committed a tortious act[8] (i.e., a violation of the Act) on Florida soil and subjected themselves to the jurisdiction of Florida courts.[9]

Second, Execu-Tech's complaint satisfies the constitutional prong of the *Venetian Salami* standard, for the complaint alleges sufficient minimum contacts between Florida and New Oji to satisfy due process concerns. Unlike other "personal jurisdiction" cases, the present case is not a "products liability" or "breach of contract" case — i.e., Execu-Tech is not alleging that New Oji paper is defective in any way or that New Oji violated an express agreement with Florida consumers. Rather, the present case is a "price-fixing" case — i.e., Execu-Tech is alleging that the conspirators introduced a "defective" price into the Florida market. The key focus is not — as New Oji contends — on the nexus between (1) the forum state, (2) the foreign corporation, and (3) the *product* (i.e., the paper manufactured by New Oji), but on the nexus between the (1) forum state, (2) the foreign corporation, and (3) the *price* (i.e., the inflated price paid by Florida consumers for the conspirators' price-fixed paper)

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8. *See generally Prosser and Keeton on The Law of Torts* 2 (W. Page Keeton, general ed., 5th ed. 1984) ("Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages."). *Cf. Snipes v. West Flagler Kennel Club, Inc.*, 105 So. 2d 164 (Fla. 1958) (holding that civil conspiracy itself may constitute a tort).

9. *See supra* note 4.

Thus, the fact that Execu-Tech has not at this point shown conclusively that any New Oji paper was sold in Florida is not dispositive, for Execu-Tech has alleged the following: (1) The conspirators (including New Oji) are the leading producers and trading houses of thermal fax paper used in the United States; (2) most of the conspirators (including New Oji) pled guilty in federal court to engaging in a nationwide criminal scheme to fix the wholesale price of their product at an artificially high level; and (3) thermal fax paper produced and distributed by the conspirators was sold at a correspondingly inflated retail price in every state, including Florida, during the class period. Based on these allegations and the supporting affidavits, we conclude that the nexus between New Oji and the retail price paid in Florida for price-fixed thermal fax paper is sufficiently clear and direct to satisfy jurisdictional requirements.

As noted above, the Florida Deceptive and Unfair Trade Practices Act is codified in part II, chapter 501, Florida Statutes (1991), and Florida's long-arm statute is codified in section 48.193, Florida Statutes (1991). These statutes gave New Oji fair notice of the applicable Florida law in this area at the time New Oji embarked upon its criminal scheme to bilk consumers throughout the United States. Because the Florida market was embraced within this nationwide scheme, New Oji reasonably should have expected to be haled into court in this state if "caught."[10]

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10. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

Actual physical presence in Florida is not required in order to establish personal jurisdiction under these circumstances.[11] As long as New Oji and the other conspirators sought to use the benefits afforded by Florida law to participate in (and profit from) the thermal fax paper market in this state, then they should have been prepared to follow Florida law governing their price-setting activities.[12]

Execu-Tech is asking only that the loss provisions of the Florida Deceptive and Unfair Trade Practices Act be applied to New Oji and the other conspirators to enable Florida consumers to recoup the losses they sustained as a result of the conspirators' illegal acts. Nothing in the long-arm statute or constitution bars such an action. We hold that the "minimum contacts" doctrine operates in an evenhanded manner in the present case. The same "minimum contacts" that allowed the conspirators to exploit Floridians in the marketplace may now be used by Floridians to establish a jurisdictional basis for recouping their losses in a court of law. The trial and district courts erred in ruling otherwise.

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11. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("[W]e have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").

12. *Cf. International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) ("But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the law of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.").

Appendix A

We quash *Execu-Tech* and approve *Wilcox* to the extent that it is consistent with this opinion.

It is so ordered.

HARDING, C.J., and WELLS, ANSTEAD and PARIENTE, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

APPENDIX B — PER CURIAM OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOR THE FOURTH DISTRICT DATED AND FILED JANUARY 21, 1998

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1998

EXECU-TECH BUSINESS SYSTEMS, INC.,

Appellant,

v.

NEW OJI PAPER COMPANY LTD.
n/k/a OJI PAPER COMPANY LTD.,

Appellee.

CASE NO. 97-2376

Opinion filed January 21, 1998

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Estella May Moriarty, Judge; L.T. Case No. 96-9639 CACE 05.

* * *

Appendix B

PER CURIAM.

In this class action, the trial court dismissed appellant's complaint as to appellee because of a lack of personal jurisdiction. The dismissal was without prejudice, the trial judge stating that if appellant could "dig up something else", in its allegations against the non-resident co-conspirator she would hear it and allow amendment prior to the trial date as to the other defendants. We affirm.

Appellant, a consumer of thermal facsimile paper, sought relief on behalf of all similar consumers based on allegations that eight defendants (all of which are foreign corporations), including appellee Oji, conspired during the period of February 1990 through March 1992 to fix the price of "jumbo rolls" of fax paper, which were then cut into smaller rolls that were sold to the ultimate consumers in the United States. Appellant's single count class action complaint alleged that the defendants conspired to fix the price of the jumbo rolls, in violation of sections 501.201-501.213, Florida Statutes; that Oji is a Japanese corporation with its principle place of business in Tokyo; that it manufactured the jumbo rolls in Japan, and the rolls were then cut and distributed for sale in the United States by both Japanese and United States trading houses.

The complaint made no specific reference to the Florida long-arm statute and did not allege that any of the paper manufactured by Oji was ever sold in Florida. In its response to Oji's motion to dismiss, appellant disclosed that it was asserting long-arm jurisdiction under sections 48.193(1)(a) and (b) Florida Statutes, and a conspiracy theory that would

attribute tortious acts committed in Florida by one defendant to all defendants.

In addition to appellee's motion to dismiss, the parties filed affidavits, two of which by either party were appropriately unconditional and one — by appellee — being "true and correct to the best of my knowledge, information and belief."

In our view, the complaint was properly dismissed, not withstanding appellant's unpersuasive reliance upon *Wilcox v. Stout*, 637 So. 2d 335 (Fla. 2d DCA 1994), which holds that if the plaintiff alleges a cause of action for conspiracy among defendants to commit tortious acts and if plaintiff shows that any member of that conspiracy committed tortious acts in Florida in furtherance of that conspiracy, then all of the conspirators are subject to Florida's long-arm jurisdiction.

Subject to a future contrary determination by this state's highest court, we adopt the following conclusion of the Supreme Court of Delaware in *Istituto Bancario Italiano v. Hunter Engineering Co.*, 449 A.2d 210 (Del. 1981):

> We therefore hold that a conspirator who is absent from the forum state is subject to the jurisdiction of the court, assuming he is properly served under state law, if the plaintiff can make a factual showing that: (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred

> in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.
>
> Thus, a defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws. It can further be said that such participation is a substantial contact with the jurisdiction of a nature and quality that it is reasonable and fair to require the defendant to come and defend an action there. Additional contacts would of course make even more equitable the jurisdiction.

449 A.2d at 225.

The complaint is the initial vehicle to supply the foregoing allegations, and here, even with consideration being given to the "affidavits", as well as the complaint's four corners, there are gaps to preclude jurisdiction.

Unless a minimum contact factor is already included in the conspiracy theory test the imposition of long-arm jurisdiction cannot pass constitutional muster under *World-*

Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980), and *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)), the Supreme Court explained that due process required that "there be some act by which the [nonresident] defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." A nonresident cannot ordinarily be subjected to jurisdiction solely on the basis of "unilateral activity of another party or a third person." *Id.* (Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984)). It is even more important to require the plaintiff to demonstrate minimum contacts in this context, where the entire basis for Florida's assertion of jurisdiction over the nonresident is an imputed act.[1] The test we adopt from *Istituto Bancario* contains a "minimum contact" component, while *Wilcox* does not.

GLICKSTEIN, STEVENSON and GROSS, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

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1. For further discussion of the co-conspirator theory, see *Hasenfus v. Secord*, 797 F.Supp. 958 (1989); *Rudo v. Stubbs*, 472 S.E.2d 515 (Ga. Ct. App. 1996); *Geo-Culture, Inc. v. Siam Inv. Management S.A.*, 936 P.2d 1063 (Or. Ct. App. 1997); *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796 (S.C. 1990). The conspiracy theory has also been applied to nonresident defendants who engage in price-fixing that affects commerce within the forum. *See, e.g., St. Joe Paper Co. v. Superior Court in and for City & County of San Francisco*, 175 Cal. Rptr. 94 (1981), *cert. denied*, 455 U.S. 982 (1982).

APPENDIX C — ORDER OF THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA DISMISSING OJI PAPER COMPANY LTD. DATED JUNE 2, 1997

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 96 009639 05

EXECU-TECH BUSINESS SYSTEMS, INC., on behalf of itself and all others similarly situated,

Plaintiff,

v.

APPLETON PAPERS, INC., a Delaware corporation; ELOF HANSSON PAPER & BOARD, INC., a Delaware corporation; KANZAKI SPECIALTY PAPERS, a Massachusetts corporation; MITSUBISHI CORPORATION, a Japanese corporation; MITSUBISHI PAPER MILLS LTD., a Japanese corporation; MITSUBISHI INTERNATIONAL CORPORATION, a New York corporation; NEW OJI PAPER COMPANY, a Japanese corporation; and NIPPON PAPER INDUSTRIES, CO., LTD., a Japanese corporation,

Defendants.

Appendix C

ORDER OF DISMISSAL OF OJI PAPER COMPANY LTD.

THE MATTER before the Court is Oji Paper Company Ltd.'s Motion to Dismiss for Lack of Personal Jurisdiction. A hearing on the Motion was held May 23, 1997 and after hearing the arguments of counsel and reviewing the file, it is hereby ORDERED AND ADJUDGED that

1. Oji Paper Company Ltd.'s Motion is granted.

2. Oji Paper Company Ltd. is dismissed without prejudice from this action.

DONE AND ORDERED in chambers at Fort Lauderdale, Broward County, Florida this 2 day of June, 1997.

s/ Estella May Moriarty
CIRCUIT COURT JUDGE

APPENDIX D — ORDER OF THE SUPREME COURT OF FLORIDA DENYING MOTION FOR REHEARING DATED MARCH 2, 2000

SUPREME COURT OF FLORIDA

THURSDAY, MARCH 2, 2000

CASE NO.: SC92881
Lower Tribunal No.: 97-2376

EXECU-TECH BUSINESS SYSTEMS, INC.

Petitioner(s)

vs.

NEW OJI PAPER COMPANY LTD., ETC.

Respondent(s)

Respondent's motion for rehearing is hereby denied.

HARDING, C.J., and SHAW, WELLS, ANSTEAD and PARIENTE, JJ., concur.

A True Copy
Test:

s/ Debbie Causseaux
Debbie Causseaux
Acting Clerk, Supreme Court